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81 -2328

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PASQUALE FANETTI,

Respondent,

–against–

HELLENIC LINES LTD.,

Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

ON PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether a shipowner choosing to act as its own stevedore is entitled to that insulation from liability, partial or total, which hiring an independent contractor-stevedore might have afforded, within the statutory scheme of the Longshoremen's and Harbor Workers' Compensation Act?

2. What quantum of evidence, relating to the effect of future taxes on earnings, is sufficient so as to permit a jury instruction based upon the after-tax principle established by Norfolk and Western Ry. Co. v. Liepelt?

COMPANIES AFFILIATED WITH PETITIONER

Listing, pursuant to U.S. Sup. Ct. Rule 28.1, 28 U.S.C. 28.1 (1981), of companies affiliated with the Petitioner, Hellenic Lines Ltd.

1. Hellenic American Agencies, Inc.
2. Universal Cargo Carriers
3. Transpacific Carriers Corp.
4. Trade Asia PTE Ltd.
5. Trade Orient Co. Private Ltd.

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Second Circuit, not yet reported, appears in the Appendix. The opinion of Judge Motley, United States District Court, Southern District, not yet reported, also appears in the Appendix.

JURISDICTION

This action originated in the United States District Court, Southern District of New York. Jurisdiction in the District Court was based upon diversity, 28 U.S.C. §1332 (1976). The judgment which is the subject of this review, was entered in the District Court on February 24, 1981. A memorandum opinion was filed by Judge Motley on June 15, 1981.

A Notice of Appeal to the Second Circuit was filed by defendant's attorney on July 14, 1981. An opinion and judgment of the Court of Appeals affirming the District Court were entered on May 6, 1982. Upon defendant's motion, dated May 13, 1982, a stay of the mandate, pending review of this petition for a writ of certiorari was ordered by the Second Circuit on May 24, 1982. A Notice of Appeal to the Supreme Court was filed by

the defendant on May 18, 1982. This petition is being docketed within thirty (30) days from the stay of the mandate in the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTES INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905 (1976).

§905 Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel

as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

The petitioner, Hellenic Lines Ltd., appeals from the affirmance of a judgment and verdict of $511,190 in favor of Pasquale Fanetti, the plaintiff, after a jury trial, in U.S. District Court, Southern District of New York. Fanetti, a longshoreman, instituted this action for personal injuries pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (1976).

The plaintiff claims that he was injured on May 6, 1980, while employed as a winch operator, aboard a vessel owned by the petitioner. At the time of the accident, Hellenic Lines Ltd. was also functioning as its own stevedore. The plaintiff and his co-workers had been procured by Hellenic as stevedores from the union hiring hall.

The longshoremen had been working aboard the vessel since approximately 8:00 a.m. The plaintiff testified that at about 2:55 p.m., while walking to his work station, after a rest period, he slipped and fell on lashing gear, which had been greased.

There was testimony that, during the morning, unidentified members of the ship's crew had placed this lashing gear in the area where Fanetti fell. The plaintiff and his co-workers, however, had continued to work. There was no testimony that the condition was called to the attention of a ship's officer.

Fanetti's immediate supervisor, another longshoreman, had been notified, prior to the accident, of the existence of this equipment on deck. This supervisor, however, failed to report this condition to the stevedore foreman.

The District Court Judge declined

Hellenic's request to charge the jury as to the stevedore's duty to correct an unsafe condition aboard ship. The Court held that since the stevedoring operations were performed by "employees of Hellenic Lines", the latter was not entitled to such an instruction.

In its post-verdict motion, Hellenic asserted that the trial court did not properly instruct the jury on the deduction of future income taxes from its determination of the amount of future lost wages. This motion was denied.

The jurisdiction of the District Court having been predicated upon diversity, 28 U.S.C. §1332 (1976), the petitioner respectfully seeks review by this Court under 28 U.S.C. §1254(1) (1976), based upon the error in the aforementioned rulings.

REASONS FOR GRANTING THE WRIT

I

THE DECISIONS OF THE COURTS BELOW ARE IN CONFLICT WITH THIS COURT'S ANALYSIS OF SECTION 905(b) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, IN EDMONDS v. COMPAGNIE GENERALE TRANSATLANTIQUE

Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act (hereafter referred to as "LHWCA") provides, in pertinent part, that a longshoreman may bring an action against a vessel and that if "such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." 33 U.S.C. §905(b) (1976). In Edmonds v.

Compagnie Generale Transatlantique, 443 U.S. 256 (1979), this Court recently had occasion to interpret this provision.

The Edmonds Court concluded that a "longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore . . . is partly to blame." Id. at 264. The Court expanded upon its analysis of Section 905(b) by adding that:

> The second sentence of the paragraph is expressly addressed to the different and less familiar arrangement where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company -- in short, to the situation where the ship is its own stevedore. In this situation, the second sentence places some limitations on suits against the vessel for injuries during its stevedoring operations.
>
> . . .
>
> It is necessary only to construe the second sen-

tence to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury. The second sentence means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself.

This leaves the question of the measure of recovery against a shipowner, whether or not it is doing its own stevedoring, when as shipowner it is only partially responsible for the negligence, but we are quite unable to distill from the face of the obviously awkward wording of the two sentences any indication that Congress intended to modify the pre-existing rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship.

Id. at 264-66.

The Edmonds Court's interpretation of Section 905(b) is the determinative point at issue in this dispute. Petitioner relies upon Section 905(b) and Edmonds as supporting its position that the courts must preserve the distinction between shipowner and stevedore even if a shipowner chooses to act as its own stevedore. Edmonds mandates that Hellenic, as shipowner, be insulated from the consequences of the negligence of those employed in its stevedoring capacity.

Contrastingly the Court of Appeals, in affirming the jury charge of the District Court, held that a shipowner acting as its own stevedore is not entitled to that insulation, which hiring an independent contractor might have afforded. For this reason, the District Court specifically denied Hellenic's request that the applicable provisions of the Safety and

Health Regulations for Longshoring, 29 C.F.R. §§1918.1, 1918.2, 1918.91 (1980) be submitted as part of its instructions to the jury. Fanetti v. Hellenic Lines Ltd., _____ F.Supp. _____ (S.D.N.Y. 1981) (Appendix at A 37) aff'd, _____ F.2d. _____, n. 1, 2 (2d Cir. 1982). These regulations charge the stevedore and its employees, the longshoremen, with the primary responsibility to correct dangerous conditions. See, Scindia Steam Navigation Co. Ltd. v. De Los Santos, 451 U.S. 156, 176-77 (1981); Evans v. Transportacion Maritima Mexicana, 639 F.2d 848, 859 (2d Cir. 1981).

The lower courts arrived at this determination by concluding that Hellenic should not be permitted to rely upon the "independent contractor" status of its stevedoring function, because it operated simultaneously as both a shipowner and a stevedore. Petitioner respectfully sub-

mits that this failure to treat Hellenic Lines Ltd., as an entity, functioning in two separate and distinct capacities was error. Hellenic relies upon the following authorities in support of this position.

First, the Court of Appeals, Second Circuit, misconstrued the legislative history of "LHWCA". The House Report states in pertinent part that:

> The Committee believes that the rights of an injured longshoreman . . . shall not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services . . . The Committee's intent is that the same principles should apply in determining

> liability of the vessel which employs its own longshoremen . . . as apply when an independent contractor employs such persons.

H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess., 3 U.S. Code Cong. & Admin. News 4705 (1972).

As evidenced by this Report, the Congressional intent was that the distinction between shipowners and stevedore safety responsibilities was to apply, with full force and effect, even though Hellenic acted as its own stevedore. The District Court's charge, however, blurred this crucial distinction. The lower Court failed to specifically instruct the jury that Hellenic could only be liable for its "owner" occasioned negligence and that it should be absolved of any negligence in its "stevedoring" capacity. Accord, Smith v. Eastern Seaboard Pile Driving, Inc., 604 F 2d 789, 795-97 (2nd

Cir. 1979) (where another Second Circuit panel preserved this distinction and rejected a so-called "single mission" theory); See also, Albergo v. Hellenic Lines Ltd., 658 F. 2d 66 (2nd Cir. 1981) (which also recognized the shipowner/stevedore dichotomy, but which the Court of Appeals in the instant action found not to be apposite to the question in Fanetti.)

Further, the courts below erroneously looked to the "corporate" structure of Hellenic and treated it as a single business entity. The Longshoremen's Act, however, focuses on a "functional", not a "corporate" approach, in delineating the relative rights and obligations of stevedores and shipowners. See, Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs, 540 F.2d 629, 632-33 (3rd Cir. 1976) (Wherein the Court compared the definitions of "employer"

and "employee" prior to and after the 1972 amendments, noting that the amendments had adopted a functional approach); cf. P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) (wherein this Court set forth a "situs" and "status" standard, i.e. "functional" test, in extending the scope of worker coverage under the LHWCA). This distinction between the legal responsibilities of Hellenic, as a shipowner and as a stevedore, was more than a mere academic exercise. It went to the very essence of the case. For even assuming arguendo that the ship's crew initially created a hazardous condition, the jury still should have been instructed to carefully scrutinize the subsequent acts and omissions (i.e. the failure to keep walking areas clear as directed by the regulations) of the stevedore (and its employees, the

longshoremen) in order to ascertain if such conduct was the cause of the accident. Hellenic was denied that opportunity of attributing this accident to an "independent" cause.

Finally, it should be noted that the decisions of the lower courts herein are also in conflict with the opinion of the Third Circuit in Griffith v. Wheeling-Pittsburgh Steel Corp., 521 F.2d 31, 41-43 (3rd Cir. 1975), cert. denied, 423 U.S. 1054 (1976). In Griffith, the Court of Appeals held that:

> The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own "owner" occasioned negligence.

Id. at 43.

The Fourth and Fifth Circuits have

expressed similar views in Richardson v. Norfolk Shipbuilding & Drydock Corp., 621 F.2d 633, 634-35 (4th Cir. 1980), Smith v. M/V Captain Fred, 546 F.2d 119, 122-23 (5th Cir. 1977) and Cavalier v. T. Smith and Son, Inc., 668 F.2d 861, 862 (5th Cir. 1982); contra, Robertson v. Jeffboat Inc., 651 F.2d 434, 436 (6th Cir. 1981), cert. pending (Docketed Jan. 1982).

To summarize, therefore, the decision of the Second Circuit herein conflicts with this Court's holding in Edmonds and with the decisions rendered in at least three other Circuits. This conflict justifies the granting of this writ.

II

THE DECISIONS OF THE COURTS BELOW CONFLICT WITH THIS COURT'S OPINION IN SCINDIA STEAM NAVIGATION CO. LTD. v. DE LOS SANTOS

During the trial of this action, the District Court did not have the benefit of this Court's recent opinion in Scindia Steam Navigation Co. Ltd. v. De Los Santos, 451 U.S. 156 (1981). The latter decision suggests that the "LHWCA" requires that a shipowner's duties be judged by a standard apart from a strict adherence to land-based principles. Petitioner submits that the District Court's charge (set forth, in part, at ___ F.2d ____ n. 1 (2nd Cir. 1982) erroneously aligned the duties of a shipowner with those responsibilities of a homeowner, or a property owner, in a non-maritime context.

Admittedly, the legislative history

to the "LHWCA" recommends that a shipowner's liability is to be judged by land based standards. 451 U.S. at 165-66 n. 13. The charge of the District Court, however, failed to clearly set forth the unique relationship among shipowner, stevedore and longshoreman. In the analogy employed by the trial judge in her charge, the jury was left with the understanding that liability flowed directly from the property owner (shipowner) to the invitee (longshoreman). This charge implied a continuing non-delegable duty extending from the property owner (shipowner) to the invitee (longshoreman). Under the LHWCA, the shipowner is, of course, required to exercise reasonable care under the circumstances. The shipowner, however, does not adopt the status of a mere property owner with a direct relationship to an invitee (longshoreman). There is a third participant, an

intermediary, in the relationship, namely the stevedore. The presence of the stevedore on the scene creates a justifiable expectation by the vessel that the stevedore will perform its tasks with reasonable competence and see to the safety of the cargo operations. 451 U.S. at 172. The shipowner is not to be burdened with primary responsibility for safety, nor with a continuing duty to inspect the cargo operations once the stevedore begins its work. 451 U.S. at 163-64 n. 10.

This Court has, in fact, noted that maritime negligence actions under "LHWCA" are not necessarily comparable to non-maritime torts. In De Los Santos, Justice White stated:

> [T]he legislative history does not refer to the Restatement and also states that land-based principles of assumption of risk and contributory negligence are not to be applied in §905(b) cases. This strongly suggests,

> as Kermarec v. Campagnie Generale Transatlantique, 358 US 625 . . . (1959), indicated, that maritime negligence actions are not necessarily to be governed by principles applicable in non-maritime contexts. Furthermore, since the lower courts are not only in disagreement as to the applicability of §§343 and 343A but also as to their import and meaning when applied in the maritime context, those sections, while not irrelevant, do not furnish sure guidance in cases such as this.

451 U.S. at 168 n. 14.

In summary, therefore, Petitioner submits that the erroneous jury instructions in the District Court did not clearly outline to the trier of fact the unique tripartite maritime relationship in this case. For this reason, the decision of the lower courts merit review.

III

THE TRIAL COURT FAILED TO INSTRUCT THE JURY PROPERLY AS TO THE DEDUCTION OF FUTURE INCOME TAXES FROM THE AMOUNT OF FUTURE LOST WAGES

Relying upon this Court's decision in Norfolk and Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980), Hellenic submitted a proposed jury instruction seeking to invoke the after tax principle set forth in that case. The District Court, however, instructed the jury only in general terms that there would be no liability for taxes on any amount awarded to the plaintiff. In its post trial motion, Hellenic claimed error, attributing it to the absence of the requested charge. Specifically, the District Court failed to employ Hellenic's proposed instruction that the jury must deduct from any amount of lost wages, the amount of income taxes

on those wages.

The Court of Appeals, in affirming the trial court, stated that Hellenic failed to invoke the after tax principle of Liepelt in a timely and proper fashion. Petitioner respectfully submits that, while no specific exception was taken to the District Court's charge on the issue, by virtue of its proposed jury instruction, Hellenic's position on this question was made clear to the Court so as to satisfy FED. R. Civ. P. 51. As one set of commentators has noted:

> The failure to object may be disregarded if the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing.

C. Wright & A. Miller, 9 Federal Practice and Procedure §2553 at 639-640 (1971); see, Lang v. Texas and Pacific Ry. Co., 624 F.2d 1275, 1279 (5th Cir. 1980).

The Second Circuit also noted that Hellenic offered no evidence to establish plaintiff's future taxes. Petitioner submits, however, that it was entitled to rely upon plaintiff's income tax returns, which were introduced into evidence. From these returns a jury was entitled to project future tax rates.

Standing alone, these tax returns were evidence sufficient to permit Hellenic to invoke the after tax principle of Liepelt. While the latter decision was based upon a trial record where an expert's estimates were called into question, this Court did not explicitly limit the application of the after tax principle to only those situations where an economist has testified. In short, if a jury was allowed to calculate plaintiff's future loss of earnings from Fanetti's tax returns, the trial court should have charged that they could like-

wise estimate Fanetti's future taxes based upon those returns.

For this reason, therefore, Hellenic submits that this petition merits review and the granting of the writ.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 468—August Term, 1981

(Argued January 14, 1982 Decided May 6, 1982)

Docket No. 81-7500

PASQUALE FANETTI,

Plaintiff-Appellee,

—v.—

HELLENIC LINES LTD.,

Defendant-Appellant.

Before:

OAKES and NEWMAN, *Circuit Judges,*
and HAIGHT, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, following a

* Of the Southern District of New York, sitting by designation.

jury trial before Judge Constance Baker Motley, and from the denial of defendant's motion for a new trial, remittitur or judgment notwithstanding the verdict.

Affirmed.

ROBERT ALEXANDER HULTEN, New York, NY (Edwin K. Reid, Zock, Petrie, Reid & Curtin, of counsel), *for Appellant.*

MORRIS CIZNER, New York, NY (Zimmerman & Zimmerman, of counsel), *for Appellee.*

HAIGHT, *District Judge*:

Hellenic Lines Ltd. ("Hellenic") appeals from a plaintiff's verdict following a jury trial in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, in an action brought under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950 (1976). The significant questions on the appeal concern Hellenic's liability, within the statutory scheme, as both shipowner and stevedore; and whether the calculation of lost future wages should be made on the basis of gross wages, or net wages after deduction for income taxes. We affirm.

I.

On May 6, 1980, plaintiff Pasquale Fanetti was working as a longshoreman on board the M/V HELLENIC

SPLENDOR, then berthed at Brooklyn, N. Y. Fanetti was part of a work gang, supervised by hatch boss Allesandro DeLiso, and engaged in loading containers at the No. 2 hatch. Fanetti operated a winch which swung one of the vessel's booms inshore and offshore.

Hellenic owned the HELLENIC SPLENDOR. It also acted as stevedore, procuring longshoremen labor directly from the union hiring hall in Brooklyn in accordance with the needs of Hellenic's vessels. The longshoremen thus hired were paid by Hellenic Lines Ltd. salary checks. This arrangement contrasts with the retention by a shipowner of an independent stevedoring contractor. Hellenic's commercial practice of assuming the dual roles of shipowner and stevedore has previously come to the attention of this Court. *Napoli v. TransPacific Carriers Corp.*, 536 F.2d 505 (1976).

Fanetti was injured at about 2:55 p.m. on May 6, as he was proceeding toward his place of work at the winch controls. The controls for the boom being used were located on a raised deck extending from the No. 2 hatch forward. Two ladders, one on the inshore side of the vessel and the other on the offshore side, gave access to the raised deck; the winch controls themselves were 10 feet forward of the hatch. Thus to get to the winch controls from a position on the deck aft of the hatch, one had to go up either of the two ladders, and then walk 10 feet to the controls. Fanetti, returning from a "blow" (rest period from work), climbed the offshore ladder and headed across the raised deck toward the winch controls. When he was about four feet away from the ladder, he slipped and fell, suffering the injuries complained of.

Fanetti alleged, and the jury was entitled to find, that the passageway he was required to transverse across the raised deck to get to his work site was obstructed by

lashing gear, including greased and oily turnbuckles, chains and wires, and that the deck itself was oily and greasy. These hazards were generated by the actions of the vessel's crew. After the longshoremen finished loading the containers, the crew was responsible for lashing them securely in place. In preparation for that work crew members brought lashing equipment onto the raised deck and dumped it on the walkways. That equipment consisted of metal turnbuckles 2-1/2-3 feet long, wires the thickness of a finger 20-25 feet long, and chains. These artifacts were greased and oiled to prevent rusting. When laid down upon the deck, they rendered portions of the deck oily and greasy. When the longshoremen commenced work at the No. 2 hatch at 8:00 a.m. there were a few turnbuckles on the deck, but throughout the day the crew brought more lashing equipment and placed it on the raised deck, so that by the time of the accident in mid-afternoon the area from the ladders to the controls was so obstructed that one had to walk over the equipment to get to the controls. While so engaged, Fanetti slipped and fell.

Fanetti and his hatch boss DeLiso both testified that they complained to "seamen" or "crewman" about the obstructions, to no avail. There was no evidence that the condition was called to the attention of a ship's officer.

The jury, after hearing this evidence and medical testimony, returned a verdict in Fanetti's favor for $511,190. Hellenic moved for judgment n.o.v., remittitur or a new trial, all of which the District Judge denied. This appeal followed.

II.

We do not understand Hellenic to dispute on the appeal that the vessel's crew, in the performance of work unrela-

ted to the longshoremen's loading of cargo, created a condition on deck dangerous to the longshoremen who had to work there. Rather, Hellenic taxes the trial court with error in its jury charge by failing to distinguish between shipowner and stevedore safety responsibilities. That distinction, or as alternatively phrased, "[t]he dichotomy between shipowner and stevedoring functions" (Hellenic brief at 3), is said to apply with full force and effect even though Hellenic, opting not to hire an independent contractor, instead acted as its own stevedore. In the light of that distinction, the argument continues, Judge Motley's charge on the subject of Hellenic's duty to plaintiff *qua* shipowner[1] was adequate. Hellenic views itself as entitled to a charge based on the standards promulgated by this Court for the situation in which a

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[1] That portion of the district court's charge relevant to the appeal reads as follows:

> "Now the duty of a shipowner to a longshoreman in these circumstances is closely related to the duty owed by homeowner or property owner to one whom the homeowner or property owner invites into his premises. In inviting others onto his premises, the owner is considered to be offering some assurance to the invitee that the place is prepared for his reception and that reasonable care has been exercised to make it safe for his use. In this case, the property of the defendant is a vessel, a ship. That is not to say that the shipowner must make his vessel absolutely free of all dangers or hazards. The shipowner's duty in this case was to exercise reasonable care under the circumstances to provide a reasonably safe place for the longshoremen to work. This means that the shipowner must take remedial steps to protect longshoremen from concealed or non obvious defects, where the shipowner knows or should have known of the condition and should realize that it is an unreasonable risk of harm.
>
> "Now in this case it is not claimed that the shipowner failed to correct a concealed or non obvious defect. It is claimed that the shipowner knew of the dangerous condition created by the seamen, since it was an open and obvious situation. The shipowner is not liable for injuries resulting from known or obvious dangers, unless the shipowner should anticipate a harm despite the obviousness of danger . . . "

shipowner hires an independent contracting stevedore. *Evans v. Transportation Maritime Mexicana SS. "CAMPECHE"*, 639 F.2d 848 (2d Cir. 1981), is cited as a recent, salutary example. *Evans,* following earlier cases decided by this Court, held that "a vessel is not liable for injuries resulting from known or obvious dangers unless the shipowner should anticipate the harm despite the obviousness of the danger," 639 F.2d at 855; the "*sine qua non* of a ship's liability for an obviously dangerous condition arising during the process of loading or unloading is reasonable anticipation that the longshoreman will not be able to avoid it." *Id.* at 856, quoting *Giglio v. Farrell Lines, Inc.*, 613 F.2d 429, 432-33 (2d Cir. 1980). "If a charge were given to the jury along the guidelines of the *Evans* case," Hellenic argues in its brief, "the verdict may have been for the shipowner rather than the plaintiff."

In particular, Hellenic argues that Judge Motley should have informed the jury that the stevedore bears the primary responsibility to correct dangerous conditions, and that the shipowner will often rely on the stevedore to do so. The charge is criticized for failing to discuss "the unique degree of anticipation to which the shipowner is entitled, based on its functional relationship with its stevedore," brief at 8. In that regard, Hellenic complains that the judge did not inform the jury that the "stevedore" was responsible for insuring compliance with relevant safety and health regulations for longshoring.[2]

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2 The particular instructions requested by Hellenic are as follows:

"8. It was the duty of the stevedore employer to furnish the plaintiff with a safe place to work. *29 C.F.R., Chapter XVII, Sections 1918.1 and 1918.2.*

"9. The safety and Health Regulations for longshoring provides that: 'Weather deck walking and working areas shall be kept

Even if the requested charge had been given, the exoneration of Hellenic on the evidence in this case is unlikely. Crew negligence created the hazard, just as in *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980), where a longshoreman fell on deck as the result "of a general obstruction of the walking area by various types of refuse." *Id.* at 33. The shipowner in *Doca* hired an independent stevedoring contractor. The district court, trying the case without a jury, assessed 90% liability against the shipowner. We affirmed, observing that "[t]he ship's crew had created this hazard, and the ship was primarily responsible for it." *Ibid.*

Nonetheless, the independent stevedoring contractor in *Doca* bore the remaining 10% of liability because a regulation promulgated by the Occupational Safety and Health Administration, 29 C.F.R. § 1918.91(a) (1979), required stevedores to keep their work area free of "tripping or stumbling hazards"; we affirmed the district court's conclusion that the regulation created a non-delegable duty to remove the hazard, adding that "[t]he fact that the hazard was primarily the ship's responsibility does not excuse the stevedore from fulfilling its regula-

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reasonably clear of lines, bridles, dunnage and all other loose tripping or stumbling hazards.' *(29 C.F.R., Chapter XVII, Section 1918.91 (a).*

"The safety and Health Regulations for Longshoring further provides: 'Slipperty conditions shall be eliminated as they occur and loose paper, dunnage and debris shall be collected as the work progresses and be kept clear of the immediate work area.' *(29 C.F.R., Chapter XVII, Section 1918.91 (c) and (d).*

"10. The responsibility for removing such hazards is on the stevedore. *(29 C.F.R., Section 1918.2 (a), .3 (c).*

"11. The shipowner had no duty to supervise the operations of the stevedore. Therefore, any failure of the stevedore to conduct its operations properly would not be the responsibility of the ship."

tory obligation," *ibid.* In the case at bar, we are not prepared to say that no reasonable jury could find that the obstruction was at a place where an independent contractor (if one existed) would have been expected to remove it. We therefore confront the question posed by Hellenic on this appeal: whether a shipowner choosing to act as its own stevedore is entitled to that insulation from liability, partial or total, which hiring an independent contractor might have afforded.

We answer that question in the negative, for the reason stated by Judge Friendly in *Napoli v. TransPacific Carriers Corp., supra,* 536 F.2d at 508, where Hellenic was also the shipowner:

> " . . . a charge which relieves a shipowner of liability for a dangerous condition which was 'known to the stevedore or to any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore."

See also *Canizzo v. Farrell Lines, Inc.,* 579 F.2d 682, 689-90 (2d Cir. 1978), Friendly, Ct.J., dissenting:

> "Where, as in [*Napoli*], there is no independent contractor, it *is* part of the ship's duty to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no 'independent contractor' with primary responsibility upon whom the ship may properly rely . . . Things are very different when the longshoreman works for an independent stevedore who has primary responsibility for the workplace." (emphasis in original).

The concept of stevedoring contractor as independent expert upon whom the shipowner may reasonably rely

runs like a *leitmotiv* through the cases, most recently *Evans, supra,* 639 F.2d at 856:

> "In determining whether a shipowner should anticipate injury to longshoremen resulting from a known dangerous condition, courts must take into consideration the independent-contractor status of the stevedore. *See Giglio v. Farrell Lines, Inc., supra,* 613 F.2d at 435; *Canizzo v. Farrell Lines, Inc., supra,* 579 F.2d at 688 (Friendly, J., dissenting). *Lubrano v. Royal Netherlands Steamship Co., supra,* 572 F.2d at 372 (Moore, J., dissenting). *See also* Comment, *supra,* at 749, 751-52; Robertson, *supra,* at 451. The stevedore is specifically hired for its expertise in coping with the dangers inherent in loading and unloading cargo, and in many cases it will be perfectly reasonable for the shipowner to assume that the stevedore will correct the defect. *See Giglio v. Farrell Lines, Inc., supra,* 613 F.2d at 433; *Canizzo v. Farrell Lines, Inc., supra,* 579 F.2d at 689 (Friendly, J., dissenting) ('No decision of this court requires us to ignore the ship's justifiable reliance on the independent contractors to perform their duty.')."

A shipowner is, of course, at liberty to refrain from hiring an independent stevedoring contractor. Presumably it does so to save money. However, that saving is accomplished at the cost of not having an independent expert on board. As myriad cases in this field demonstrate, the presence of the expert independent stevedoring contractor furnishes the shipowner with significant protection, in the form of insulation from liability for its own acts which would otherwise attach. But the ship-

owner cannot save the premium and still claim the protection.

Hellenic argues that the analyses quoted from *Napoli* and *Canizzo* would never have been articulated if the Supreme Court's decision in *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979), had then been available. We do not agree. In *Edmonds* the injured longshoreman was employed by an independent stevedoring company. The jury determined that he was responsible for 10% of the total negligence resulting in his injury, that the stevedore's fault, through a co-employee's negligence, contributed 70%, and that the shipowner was accountable for 20%. The district court reduced the longshoreman's recovery by 10%, but refused further to reduce the award against the shipowner in proportion to the fault of the employer. The Fourth Circuit reversed and held the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault, regarding that result as necessary to reconcile two sentences added as part of the 1972 amendments to LHWCA at 33 U.S.C. § 905(b). Those sentences read:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring in action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if

> the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

The Supreme Court reversed and reinstated the judgment of the district court. The Court observed that the first sentence of § 905(b) was drafted by Congress to overrule the express or implied warranty of a stevedore's workmanlike service declared in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which could result in indemnification of the shipowner by the stevedore for the former's liability to the longshoreman. By overruling *Ryan*, the first sentence of § 905(b) "prevents the vessel from recouping from the stevedore any of the damages that the longshoreman may recover from the vessel." 443 U.S. at 264. The Court continued:

> "But the sentence neither expressly nor implicitly purports to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame." *Ibid.*

Rather than stopping there, the Court in *Edmonds* went on to analyze the second sentence of § 905(b). Although recognizing that application of the second sentence "is not involved in this case," *id.* at 265, the Court engaged in the analysis to deal with inconsistencies between the two sentences perceived by the Fourth Circuit. The Court stated:

> "The second sentence of the paragraph is expressly addressed to the different and less familiar arrange-

ment where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company—in short, to the situation where the ship is its own stevedore. In this situation, the second sentence places some limitations on suits against the vessel for injuries caused during its stevedoring operations. Whatever these limitations may be, there is no conflict between the two sentences, and one arises only if the second sentence is read, as the Court of Appeals read it, as applying to all injured longshoremen, whether employed by the ship or by an independent stevedore. Nothing in the legislative history advises this construction of the sentence, and we see no reason to depart from the language of the statute in this respect." *Id.* at 264-65 (footnotes omitted).

To avoid any other practical difficulties, the Court continued:

" . . . it is necessary only to construe the second sentence to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury. The second sentence means no more than that *all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself.*

"This leaves the question of the measure of recovery against a shipowner, whether or not it is doing its own stevedoring, when as shipowner it is only partially responsible for the negligence, but we are quite unable to distill from the face of the obviously

awkward wording of the two sentences any indication that Congress intended to modify the pre-existing rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship." *Id.* at 266 (emphasis added).

Hellenic relies upon the italicized language as supporting its contention that a shipowner acting as its own stevedore should be entitled to rely upon itself as expert stevedoring contractor, thereby insulating itself from the consequences of its negligence as shipowner. Additional authority for this proposition is also said to be found in the legislative history of the 1972 amendments.[3] In our view, however, the *Edmonds* Court's attempted clarification of "the obviously awkward wording of the two sentences" of this statute should not be so far removed from the context in which it was given as to require what we continue to consider, with Judge Friendly in *Napoli* and *Canizzo,* an illogical result. The Court's purpose in *Edmonds* was to achieve a statutory construction which would permit an injured longshoreman to recover his full damages from a shipowner only concurrently negligent. That was also the thrust of the legislative history, with its articulated belief "that the rights of an injured longshore-

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3 S.Rep.No. 92-1125 (1972) states at pp. 11-12:

"The Committee believes that the rights of an injured longshoreman . . . shall not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services . . . The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen . . . as apply when an independent contractor employs such persons."

man . . . shall not depend on whether he was employed directly by the vessel or by an independent contractor." That salutary purpose may be preserved without requiring trial judges to give juries instructions about the shipowner's right to rely upon an expert contractor who, in fact, was not there. The concept is schizophrenic and the predictable effect upon the jury one of bafflement. The Supreme Court itself, in the later case of *Scindia Steam & Navigation Co. v. De Los Santos*, 415 U.S. 156 (1981), emphasized that "the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty." *Id.* at 176. Implicit in that analysis is the existence of an independent, expert stevedore upon whom the shipowner's "justifiable expectations" may reasonably fall. In those circumstances, and as Judge Friendly said in *Canizzo*, "[t]hings are very different"; and we do not read in *Edmonds* anything which requires us to accede to Hellenic's request that illusion be substituted for reality.

We hold that the requested charge is not appropriate where, as here, the shipowner acted as its own stevedore. In consequence, we find no error with the district court's instructions.[4]

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[4] *Albergo v. Hellenic Lines, Inc.*, 658 F.2d 66 (2d Cir. 1981), also relied on by Hellenic, is not to the contrary. *Albergo* affirmed the district court's grant of judgment n.o.v. to defendant because "as a matter of law there was no factual or legal basis for an anticipation by the ship that the plaintiff would be unable to avoid the claimed hazard despite its obviousness and the way he himself dealt with it." The decision continues:

> "The simple act performed by the plaintiff of moving the skinny rope cuttings aside with his hand from the area where he had to shackle, which was the area of the accident, eloquently strikes down any notion of the existence of a negligent condition for which the

III.

Hellenic complains of the district judge's charge on the subject of income taxes. The court's charge on that subject in its entirety was as follows:

> "If you make an award to the plaintiff, the amount so awarded is not subject to federal or state income taxes and no amount may be added to the award believing that such taxes would be due."

Hellenic made no objection to the charge as given. However, in a post-verdict motion it asserted that a new trial was required because the jury was not also instructed to deduct future income taxes from its determination of the amount of future lost wages. Reliance was placed upon *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490 (1980).

Liepelt, a death action brought under the Federal Employers' Liability Act ("FELA"), held that the trial court erred in excluding the defendant's proffered testimony of an expert witness that the decedent's federal income taxes, during the period of lost future wages, would have amounted to a particular figure, which defendant wished to urge in reduction of damages. The Court held in *Liepelt* that under the FELA, the measure of

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vessel owner could be held in damages. As a matter of law there was no such negligent condition nor any basis for anticipation that the longshoreman could not avoid the rope in this case—certainly not one remaining at any time after plaintiff cleared the untidy condition impeding him." *Id.* at 69.

Hellenic was the defendant in *Albergo,* and again acted as its own stevedore. While language in the opinion could be read as recognizing the shipowner/stevedore dichotomy, the context was entirely different. Unlike the case at bar, *Albergo* did not involve injury to a longshoreman resulting from a hazardous condition created by crew negligence. We do not regard *Albergo* as apposite to the question presented here.

recovery is the damages that flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received. Since it is after-tax income, rather than gross income before taxes, that provides the only realistic measure of a wage earner's ability to support his family, it necessarily follows "that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependends when he dies." 444 U.S. at 493-94. The Court rejected "the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury," *ibid.*, and remanded the case for further proceedings consistent with its opinion.[5]

Although for the reasons stated *infra* Hellenic is not in a position to benefit from it, we take this opportunity to extend the *Liepelt* decision at least to all claims for future wages based solely on federal law. In *McWeeney v. New York, New Haven & Hartford R.R. Co.*, 282 F.2d 34 (2d Cir.) (*en banc*), *cert. denied*, 364 U.S. 870 (1960), an FELA case, we held that the district court had not committed error in refusing defendant's request that the jury be instructed to "calculate any past or future loss of earnings on the basis of [plaintiff's] net income after deduction of income taxes." *Id.* at 35. But Judge Lumbard's dissenting observation—"it seems to me that it is manifestly unfair to a defendant to ignore the substantial item of income tax payments on future income," *id.* at 43—forecast the Supreme Court's identical conclusion in *Liepelt*; and we see no basis for distinguishing in this regard between FELA and LHWCA cases. Focusing

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5 The second point of decision in *Liepelt* was that a defendant is entitled to a jury instruction that the award of damages would not be subject to income taxation. 444 U.S. at 496-98. As noted *supra*, Judge Motley gave that instruction in the case at bar.

upon after-tax earnings is an exercise in economic fairness; by this decision we extend it at least to all federal law claims for future lost wages. Cf. *Gulf Offshore Co. v. Mobil Oil Corp.*, ____ U.S. ____, 101 S.Ct. 2870, 2880 (1981), a personal injury case arising under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*, ("OCSLA"), in which the Court characterized the *Liepelt* instruction that damage awards are not subject to federal income taxation as an instruction which furthers "strong federal policies of fairness and efficiency in litigation of federal claims."[6]

However, to take advantage of the after-tax principle, a defendant must invoke it in timely and proper fashion. In the case at bar, Hellenic cited *Liepelt* in its original request that the judge charge the jury:

> "If you find that plaintiff's damages from his accident include lost wages, then you must subtract the amount of income taxes plaintiff would have had to pay on those lost wages."

But Hellenic, unlike the defendant in *Liepelt*, offered no evidence to establish what amount of future taxes plaintiff would have incurred.[7] Hellenic did not seek a stipula-

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[6] *Gulf Offshore Co.* did not consider the applicability to OCSLA cases of *Liepelt's* holding that defendant is entitled to introduce evidence showing the effect of income taxes on plaintiff's future earnings. 101 S.Ct. at 2879 n.14.

We leave for another day a defendant's entitlement to a *Liepelt* charge where federal jurisdiction is based solely on diversity of citizenship. Again, *cf. Gulf Offshore Co.*, where the Court, in view of the particular federal/state choice of law provisions in OCSLA, remanded the case for a determination of whether Louisiana law required the instruction and, if it did not, whether *Liepelt* displaced the state rule in an OCSLA case. *Id.* at 2880.

[7] Some of the factors to be considered in the calculation of future taxes are summarized in *Liepelt* at 494:

(footnote continued on next page)

tion from plaintiff on the point before resting its case. While plaintiff's more recent tax returns had been received in evidence to prove his past earnings, Hellenic did not indicate before the evidence closed that it would rely on those returns to quantify future taxes, thereby depriving plaintiff of an opportunity to offer his own evidence, expert or otherwise, of what his future taxes might be. For that reason we reject Hellenic's argument that the trial judge should have instructed the jury on the basis of the past tax returns, or used them to make future tax calculations herself. Finally, Hellenic did not object to the charge ultimately given by the district court on the general subject of taxes. In these circumstances, Hellenic is not entitled to relief on appeal.

For the future guidance of the district courts and trial bar, we hold that a defendant confronted with a claim for future lost wages is entitled to an after-tax charge based on *Liepelt* when there is present in the record a stipulation of future taxes; or evidence of future taxes; or evidence of past taxes, in which event the jury should be instructed that it is entitled to assume a future tax amount or tax percentage of wages comparable to the past tax years.[8]

"Admittedly there are many variables that may affect the amount of a wage earner's future income-tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life."

8 Some flexibility may be required. Typically in such cases the evidence of past earnings takes the form of W-2 forms showing gross

We have considered Hellenic's other points on appeal, and find them without merit.

Affirmed.

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wages and withheld taxes for a calendar year. If the year in which the accident in suit occurred is included in the proof, it must be discounted as an economic barometer, since earnings in that accident-interrupted year will be less than normal, and the tax indebtedness accordingly uncharacteristic.

Application of this rule to the case at bar would not have been fair, since prior to the ruling we announce today plaintiff had no way of knowing that we would permit such a charge in such circumstances and under such an assumption.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

A. Daniel Fusaro
Clerk

Fanetti v. Hellenic Lines Ltd.
Docket No. 81- 7500

August Term, 1981
Decided May 6, 1982

Page 2571, line 13 - delete "adequate." and insert "inadequate." in place thereof.

A. DANIEL FUSARO, Clerk

ADF/hjd

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PASQUALE FANETTI,

Plaintiff-Appellee,

-against-

HELLENIC LINES LTD.,

Defendant-Appellant.

Docket No. 81-7500

NOTICE OF MOTION
FOR STAY OF MANDATE PENDING
APPLICATION FOR CERTIORARI
PURSUANT TO RULE 41 (b)
FED. R. APP. P.

Motion by:

Zock, Petrie, Reid & Curtin
Edwin K. Reid & Martin E. Coffey
(212) 425-0310

Opposing Counsel:

Zimmerman & Zimmerman
Martin Lassoff, Esq.
(212) 227-1350

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, FILED MAY 13, 1982, A. DANIEL FUSARO, CLERK

Has a request of opposing counsel for consent been refused? YES

Has service been effected? YES

Is oral argument desired? NO

Requested Return Date: May 25, 1982

Date of argument of appeal, if scheduled:

Judge or Agency whose order is being appealed:

Judges Newman, Oakes & Haight

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? NO

Would expedited appeal eliminate need for this motion? NO

If no, explain why not:

Stay is sought to allow appellant to prepare petition for certiorari.

Brief statement of the relief requested:

Stay of mandate pending defendant-appellant's application to the Supreme Court for a writ of certiorari.

Previous requests for similar relief and disposition: None

Statement of the issue (s) presented by this motion:

Should the mandate be stayed pending defendant-appellant's application for certiorari to the Supreme Court.

Brief statement of the facts:

Hellenic Lines Ltd. appealed from the denial of its motion for judgment n.o.v., remittitur or for a new trial after a jury verdict in favor of the plaintiff in U.S. District Court, Southern District, New York, in an action for personal injuries brought under the Longshoremen's and Harbor Workers' Compensation Act, which resulted in a judgment for the plaintiff in the amount of $511,190. All of these trial motions were denied. The Court of Appeals, Second Circuit, affirmed.

Summary of the argument:

Defendant-appellant submits that this Court should stay the mandate because this action raises significant questions regarding the scope of the duty to longshoremen by a shipowner, which simultaneously functions as a stevedore; and that the Supreme Court has not squarely addressed this issue in its previous opinions explicating the shipowner-stevedore relationship. In view of the size of the lower Court verdict and the significance of the issue to be raised in a further appeal, it is, therefore, requested that a stay of the mandate be issued.

5/13/82

MARTIN E. COFFEY
Attorney for
Defendant-Appellant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, FILED MAY 24, 1982, A. DANIEL FUSARO, CLERK.

5/24/82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PASQUALE FANETTI, :

Plaintiff, : 80 Civ. 3689 (CBM)

-against- :

HELLENIC LINES LTD., :

Defendant. :

----------X

APPEARANCES:

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Attorneys for Defendant

CONSTANCE BAKER MOTLEY, D.J.

MEMORANDUM OPINION

On February 13, 1981, the jury entered a verdict in this longshoreman's injury suit in favor of plaintiff, Pasquale Fanetti, in the amount of $511,100. Defendant, Hellenic Lines Ltd. (Hellenic Lines), moved for judgment n.o.v., remittitur or a new trial on a number of grounds. For the reasons discussed below, defendant's motion is denied.

Pasquale Fanetti commenced this action on June 30, 1981, against Hellenic Lines, the owner of the M.V. Hellenic Splendor, to recover for injuries allegedly sustained while he was working as a longshoreman aboard the vessel. Fanetti claimed that during the course of stevedoring operations a dangerous condition developed aboard the vessel when the seamen employed by

Hellenic Lines placed greasy wires and cables on the deck in the area in which Fanetti was required to work. At about 3 o'clock in the afternoon of May 6, 1980, when Fanetti was walking back to his station to operate the winch, he slipped on the grease left on the deck by the wires and fell on the wires, suffering injuries to his neck, back and shoulder. Fanetti alleged that the accident was due to Hellenic Lines' negligence in failing to remedy this obviously dangerous condition.

After a five-day trial, the jury found that Hellenic Lines' negligence was a proximate cause of the accident and awarded Fanetti $50,000 for past pain and suffering, $50,000 for future pain and suffering, $1,100 for past medical expenses, $1,500 for future medical expenses, $29,000 for past lost wages, and $550,000 for future

lost wages. The jury subtracted $170,500 from the total amount of damages of $681,600, representing the amount of plaintiff's contributory negligence, which it found to be 25 percent. The final award was $511,100. See Special Interrogatories to the Jury - Damages.

Hellenic Lines argues that the Court should enter judgment n.o.v. because there was no evidence that a complaint regarding the grease on deck was ever made to a mate or ship's officer with supervisory powers. A shipowner can only be liable if it has actual or constructive notice of the dangerous condition that led to the longshoreman's injury. Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 685 (2d Cir. 1978); Evans v. Transportacion Maritime Mexicana SS "Campeche", 639 F.2d 848, 855 (2d Cir. 1981). The jury was charged as to this rule. See

Charge of the Court, p. 12. Hellenic Lines relies on Judge Friendly's dissent in Canizzo v. Farrell Lines, Inc., supra, 579 F.2d at 690, for its contention that any knowledge of the ship's deckhands about the grease would be imputable to the shipowner only if they had a duty to inform the shipowner about it or if they were ship's officers. Judge Friendly's dissent, however, is in conflict with the majority opinion on this point.

The majority in Canizzo v. Farrell Lines, Inc., affirmed the district court's judgment establishing liability on the part of the shipowner for injuries sustained by a longshoreman when he slipped on a patch of grease which was partially covered by a pile of wires which lay on the deck. The district court found that the shipowner had actual or constructive knowledge of the obviously dangerous condition inasmuch

as the ship's personnel should have seen the grease on the deck when they placed cluster lights in the area. This finding rested on testimony that the grease, wire and cluster light wires existed in the area of the accident, that the grease was there three or three and one-half hours before the accident, and that the cluster lights had been placed on the deck by the ship's company. Canizzo v. Farrell Lines, Inc., supra, 579 F.2d at 684, 686. The Court of Appeals concluded,

> [t]he existence of a substantial area of grease in a narrow passageway, which should have been known to the ship's personnel, made more dangerous by the positioning by the ship's personnel of the cluster lights and wires upon the greasy area supports the finding of negligence on the part of the ship and justifies the plaintiff's judgment. . . .

Id at 686.

Thus, in the instant case, it was proper for the jury to find that Hellenic Lines had actual or constructive notice of the dangerous condition based on the evidence that the ship's crew created the condition by placing greasy wires on the deck where Fanetti was required to work.

Hellenic Lines argues that a new trial is required because this Court failed to instruct the jury as to the stevedore's responsibility for the safety of the longshoremen, including the contents of the relevant Safety and Health Regulations for Longshoring. Hellenic Lines' argument is based on the recent Court of Appeals' decision in Evans v. Transportasion Maritime Mexicana SS "Campeche", 639 F.2d 848 (2d Cir. 1981) (Evans), which held that the trial court erred in neglecting

to include such a charge to the jury. The Court in Evans set forth a detailed analysis of a shipowner's liability for negligence in longshoremen's injury suits, "[r]ecognizing that district courts can 'scarcely be expected to function with so discordant a chorus on this court,'. . ." Id. at 853 (citation omitted). Unfortunately, the correctness of Hellenic Lines' assertion under the standards set by this Circuit remains uncertain after Evans.

The gravamen of the Court of Appeals' opinion in Evans regarding a shipowner's negligence in the case of an obviously dangerous condition is that "a vessel is not liable for injuries resulting from known or obvious dangers unless the shipowner should anticipate the harm despite the obviousness of the danger." Id. at 855.

The Court went on to hold that "[i]n determining whether a shipowner should anticipate injury to longshoremen resulting from a known dangerous condition, courts must take into consideration the independent-contractor status of the stevedore". Id. at 856 (emphasis added). The Court explained that, "[t]he stevedore is specifically hired for its expertise in loading and unloading cargo, and in many cases it will be perfectly reasonable for the shipowner to assume that the stevedore will correct the defect." Id. In achieving the goal of reaching a realistic conclusion concerning the shipowner's reasonable anticipation, therefore, the trier of fact should recognize that ordinarily a ship should be entitled to rely on its stevedore to perform its job in a safe and workmanlike fashion. Accordingly, the Court

of Appeals held that the district court erred in failing to inform the jury that, for the purpose of determining shipowner anticipation, they could consider the fact that the stevedore, which was an independent contractor, is primarily responsible for the safety of the longshoremen and is obligated to take whatever steps are necessary to correct an unsafe condition aboard the ship. Id at 860.

The court in its charge in the instant action followed the general rule set forth in Evans by instructing the jury as follows:

> [t]he shipowner is not liable for injuries resulting from known or obvious dangers unless the shipowner should anticipate a harm despite the obviousness of the danger. In other words, mere knowledge of the dangerous condition may not serve as an

> independent basis for liability. Rather, the shipowner must be held liable for an obviously dangerous condition arising during the process of loading and unloading only if it, the shipowner, should reasonably have anticipated that the longshoreman would not be able to avoid harm.

Charge of the Court, pp. 11-12. The Court determined, however, that it was not necessary to instruct the jury as to the stevedore's duty to correct an unsafe condition aboard ship since the stevedoring operations in the instant action were performed by employees of Hellenic Lines and not by an independent contractor, as was the case in Evans. Thus, unlike the situation in Evans, there was no independent contractor with primary responsibility upon whom Hellenic Lines could reasonably rely to correct the dangerous condition.

See Canizzo v. Farrell Lines, Inc., supra, 579 F.2d at 689 (Friendly, J., dissenting). It would therefore not have been helpful to the jury in reaching a realistic conclusion concerning the shipowner's reasonable anticipation to instruct them as to the stevedore's duties. Accordingly, this court rejects Hellenic Lines' argument that Evans requires that the Court include such instructions when the stevedore is not an independent contractor.

Hellenic Lines also moves for a new trial on the ground that plaintiff's medical testimony regarding his permanent injuries was so speculative that it should not have been submitted to the jury. Fanetti presented two medical experts who testified as to his injuries - Dr. Leo J. Koven, an examining orthopedist, and Dr. Suda B.

Patel, who was in partnership with Fanetti's treating doctor. Dr. Koven testified that his diagnosis of Fanetti's condition, based on his physical examination of Fanetti and his analysis of x-rays of Fanetti's neck, was that Fanetti suffered from a quiescent, pre-existing arthritis and pinching of a nerve in the root of his neck which had been aggravated by the accident of May 6, 1980. Dr. Koven also testified that Fanetti suffered from adhesive capsulitis of the injured shoulder, also known as frozen shoulder, caused by the tearing of tissue and bleeding, which painfully limited Fanetti's ability to lift his right arm. Testimony of Dr. Koven, pp. 7-8. Dr. Koven testified that, with reasonable medical certainty, the accident of May 6, 1980, was the competent producing cause of these injuries and that, with

reasonable medical certainty, he did not believe that Mr. Fanetti would ever be able to return to work as a longshoreman. Testimony of Dr. Koven, pp. 9-10. Dr. Patel also testified that Fanetti suffered from adhesive capsulitis as a result of the accident and that, with reasonable medical certainty, Fanetti would not be able to return to work. Testimony of Dr. Patel, pp. 11, 12, 15. In light of this testimony, the court finds that there was sufficient evidence for the jury to find that Fanetti suffered from a frozen shoulder and an aggravation of his pinched nerve condition which resulted from the accident and which created a permanent disability.

Hellenic Lines contends that a new trial or remittitur is required because plaintiff failed to mitigate his damage by getting an electromyogram (EMG).

This argument is not persuasive. Dr. Patel testified that the purpose of EMG studies would be to determine the extent of the damage to Fanetti's nerves. Testimony of Dr. Patel, p. 13. There was no evidence that the EMG would have provided treatment of Fanetti's injuries or would have otherwise served to diminish Fanetti's damages.

Hellenic Lines contends that it is entitled to a new trial because the jury did not have before it a present worth table when it calculated the amount of plaintiff's award for future pain and suffering and future lost wages. The Court instructed the jury that in the case of the award of future damages it was required:

> to discount, or reduce to its present worth the amount of the anticipated future loss by taking, one, the interest rate which plaintiff could reasonably be

> expected to receive on an investment today of a lump sum payment together with, two, the period of time over which the future loss is reasonably certain to be sustained, and then deduct from the total award for anticipated future losses whatever that amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time, and include in the verdict an award for only the present worth, that is, the reduced amount of the total anticipated future loss.

Charge of the Court, pp. 25-26. The court suggested that the jury use a discount rate of two percent. The court also noted that it took judicial notice of a chart which shows the present worth of a dollar invested today over a period of years at the rate of two percent and that the jury might send for the chart if it got to

the point of calculating present worth.

After the jury returned its verdict in favor of plaintiff the court questioned the forelady of the jury as to whether the amounts awarded for future pain and suffering, future medical expenses and future lost wages had been discounted to their present value. The forelady responded that the jury had discounted the awards to their present value as the court instructed. Transcript, 3-13-81, pp. 1-2. The court concludes that the jury was properly charged as to the requirement that awards for future damages be discounted to their present worth. The two percent present value chart is only an aid to the jury in making its calculations of present value; the jury's failure to use it does not require a new trial.

Finally, Hellenic Lines asserts that a new trial is required because the

jury was not instructed to deduct future income taxes from its determination of the amount of future lost wages. Hellenic Lines relies on a recent United States Supreme Court decision, Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490 (1980) (Liepelt), for this contention. In Liepelt, a wrongful death action arising under the Federal Employer's Liability Act, the Supreme Court held that the trial judge erred in excluding evidence of the income taxes payable on the decedent's past and estimated future earnings and in refusing to instruct the jury that the award of damages would not be subject to income taxation. The petitioner in Liepelt had offered to prove in the trial below through the testimony of its expert, an actuary, that the decedent's federal income taxes during the years 1973 through 2000 would have

amounted to about $57,000.

Upon consideration of the holding in Liepelt, this court finds that its charge was in accordance with the Supreme Court's ruling. The court charged the jury, as required by Liepelt, that "[i]f you make an award to the plaintiff, the amount so awarded is not subject to federal or state income taxes and no amount may be added to the award believing that such taxes would be due." Charge of the Court, p. 27. The court did not exclude any evidence offered by Hellenic Lines of income taxes payable on Fanetti's estimated future earnings. In fact, Hellenic Lines' counsel states in its memorandum of law in support of its motion that "there was no evidence on this issue [of plaintiff's future income taxes] except for some of plaintiff's prior income tax returns." Defendant's Memorandum

of Law at 26-27. The holding in Liepelt only required that the trial judge allow defendant to introduce evidence of income taxes payable on estimated future earnings; it did not require that the trial judge instruct the jury to deduct future income taxes where no evidence was presented.

For the reasons discussed above, Hellenic Lines' motion for a new trial, remittitur or judgment n.o.v. is denied.

Dated: New York, New York
June 15, 1981

CONSTANCE BAKER MOTLEY
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of May, one thousand nine hundred and eighty-two

Present:

Hon. James L. Oakes

Hon. Jon O. Newman
Circuit Judges

Hon. Charles S. Haight,
District Judge

PASQUALE FANETTI,

Plaintiff-Appellee,

v. 81-7500

HELLENIC LINES LTD.,

Defendant-Appellant.

UNITED STATES COURT OF APPEALS, SEC. CIR.
FILED MAY 6, 1982, A. DANIEL FUSARO, CLERK

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

A. Daniel Fusaro, Clerk

By Edward J. Guardaro,
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PASQUALE FANETTI,

Plaintiff,

-against-

80 Civ. 3689 (CBM)

HELLENIC LINES LTD.,

Defendant.

----------X

JUDGMENT #81,0201

The issues in the above entitled action having been brought on regularly for trial before the Honorable Constance Baker Motley, United States District Judge and a jury on February 9, 1981, and at the conclusion of the evidence the jury having answered the attached "Special Interrogatories to the Jury" finding in favor of the plaintiff as against the defendant in the sum of $681,600.00., and the jury having

further found contributory negligence on the part of the plaintiff to the degree of 25%, thereby reducing the final award to $511,100.00., it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment as against the defendant in the sum of $511,100.00.

(CBM) Defendant shall have 30 days from date of verdict to file post trial motions.

Dated: New York, New York
February 21, 1981

_____
Clerk

APPROVED:

_____
U.S.D.J.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PASQUALE FANETTI,

Plaintiff-Appellee,

-against-

Docket No. 81-7500

HELLENIC LINES LTD.,

Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Hellenic Lines Ltd., the defendant-appellant above-named, hereby appeals to the Supreme Court of the United States from the judgment entered in this action on May 6, 1982, affirming a judgment entered in the United States District Court, Southern District, for the plaintiff, after a jury trial.

This appeal is taken pursuant to

28 U.S.C. §1254.

Pursuant to U.S. Sup. Ct. Rule 28.5, 28 U.S.C. Rule 28, all parties required to be served have been served and counsel's names and addresses are listed below.

Dated: New York, New York
May 18, 1982

ZOCK, PETRIE, REID & CURTIN

By _____
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To: Zimmerman & Zimmerman
160 Broadway
New York, New York 10038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PASQUALE FANETTI, :

Plaintiff, :80Civ.3689 (CBM)

-against- :

HELLENIC LINES LTD., :

Defendant. :

----------X

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, that defendant herein, Hellenic Lines Ltd., does appeal to the United States Court of Appeals for the Second Circuit from the entire Order/Opinion of the Honorable Constance B. Motley, United States District Judge, dated June 15, 1981.

Dated: New York, New York
July 14, 1981

Yours etc.,

ZOCK, PETRIE, REID &
CURTIN
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UNITED STATES DISTRICT COURT, FILED,
JULY 14 1981, S.D. OF N.Y.

81-2328

No. .....

Office - Supreme Court, U.S.
FILED
JUL 23 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HELLENIC LINES LTD.,

Petitioner,

—against—

PASQUALE FANETTI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

MORRIS CIZNER
Counsel for Respondent
160 Broadway
New York, New York 10038

Questions Presented

Basically, Petitioner's position is that although it is *one* company organized to own and operate ships as well as to perform its own stevedoring work, it is to be considered as two separate companies as far as longshoremen are concerned—one a shipowner and the other a stevedore. They justify their split personality by pointing to *Reed* v. *The Yaka*, 373 U.S. 410 (1963). The latter case merely permits suits by a longshoreman against his employer if they are also shipowners. It does *not* wipe out an employer-employee relationship with duties and obligations flowing therefrom. Nor does *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) change the *Reed* v. *The Yaka* holding or rationale.

Furthermore, on the facts here, where the dangerous condition was created by the ship's crew who were engaged in a negligent method of operation in a walking area on deck, under their control, shipowner would in any event be primarily liable for the harm resulting from the crew's activity. *Scindia Steam Navigation Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981). Petitioner attempts to confuse the case raising false issues with the hope of a radical change in the basic law heretofore applicable in maritime cases. The real questions presented are, therefore:

1. Should this Court change the basic law governing employer-employee relationships so that an employer has no duties or obligations to its employees if they are longshoremen?

2. May a shipowner act in a negligent manner and still escape all responsibility for the results of its affirmative acts with disregard for the health and safety of longshoremen?

3. Does Sec. 905(b) of 33 USC intend to deprive a longshoreman of his right to sue his shipowner-employer for its negligence?

With respect to the second question presented by Petitioner, on trial the defendant offered no testimony as to what the taxes would be on future earnings, did not object to the jury charge as it pertains to this matter; and the Circuit Court for the first time ruled that the after-tax principle of *Norfolk and Western Ry Co.* v. *Liepelt,* 444 U.S. 490 (1980) should apply to longshoremen's cases. The question should properly be:

1. Should the *Liepelt* principle be applied to a longshoremen's maritime negligence law suit?

2. If the after-tax rule does apply here, should cost of litigation and attorney's fees be deducted as an expense reducing the net future earnings accordingly?

Although respondent has suggested the "real" questions presented by the petitioner herein, there is no merit to the application for a writ of certiorari. The denial of the Petition would serve the interests of justice.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. .....

HELLENIC LINES LTD.,

Petitioner,

—against—

PASQUALE FANETTI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

I.

Statement of the Case

1. *Facts*

Our case involves an open and obviously dangerous condition in the walking area of the top or main deck of the defendant's vessel. It was in the pathway leading from the ship's ladder to the winch controls where plaintiff was required to work. The passage was obstructed, being cluttered with lashing gear including greased and oiled turnbuckles, chains and wires and the deck was oily and greasy. It was an area used in common by the ship's crew and longshoremen.

Our case involves an on-going negligent method of operation by the ship's crew creating and maintaining a hazardous condition throughout the day in a walkway, making it unsafe for longshoremen to go to their place of work.

The dangerous condition did not arise out of the loading or unloading work being performed by the longshoremen. It did not arise within the confines of the stevedoring operations. The ship's crew created the danger and were in control of and maintained the area. It was their duty, solely, to lash the cargo after the longshoremen had finished loading containers. In preparation for the performance of their work they were bringing the lashing equipment over to the raised deck and dumping it in the walkway. This on-going operation by the crew while the longshoremen were attempting to load cargo created a most hazardous condition. They performed their work in such negligent manner throughout the day so that at about 3.00 P.M. an area of about 10 feet in front of both ladders leading to the winch controls was dangerously obstructed and slippery.

The longshoremen were not hired to clean the deck; to supervise the ship's crew in the manner and method of the performance of their work; to perform housekeeping chores; to correct the work performed by the ship's crew while they were engaged in such performance; and to perform the lashing work. The crew was told not to do their work in the manner performed by them and were told to remove that which they created. They said they would but failed to do so. They could not rely upon the longshoremen supervising them or cleaning up the deck; nor could the longshoremen remove the large amount of such equipment and yet find time to perform the work they were hired to do. Nor did the longshoremen attempt to clean up after the seamen.

The longshoremen were the employees of shipowner hired to do loading and unloading of cargo only. There is no independent contractor relationship here—legally or factually. There is more than a measure of supervision and control of the activity of the longshoremen exercised by Hellenic Lines, including the ship's officers, and there is no "dichotomy between shipowner and stevedoring functions".

The ship's crew were performing their work in a negligent manner and the deck was made dangerous. They failed to correct same when it was their responsibility to do so. As a result of their negligent conduct, plaintiff was injured. The jury so found, and justifiably so.

Plaintiff, a longshoreman then 39 years of age, was injured on May 6, 1980 on defendant's vessel, the S.S. HELLENIC SPLENDOR, which was docked at the 57th Street Pier, Brooklyn, New York. He was employed by the defendant as a winch operator. Heavy lifts (containers and heavy cases weighing over 5 tons each) were being loaded in and at Hatch No. 2. A baby jumbo boom located forward of the hatch was being used. This necessitated the operation of winch controls forward of the hatch for up and down movement and the operation of winch controls aft of the hatch for swinging the boom inshore and offshore.

At the time of the accident plaintiff was going to the forward winch controls to relieve a winch operator but he never got there for his accident occurred en route to his place of work.

The forward portion of the main deck from Hatch No. 2 forward was raised. The raised deck was the main deck. The winch controls for the baby boom were on this raised portion of the deck. They were located 10 feet forward of the No. 2 Hatch. The raised deck continued from these controls to the bow, a distance of another 40 feet. Actually, the raised deck was not a platform. There were 2 ladders leading to the raised deck forward. There was 1 ladder on the inshore side and one on the offshore side. To go to the winch controls you had to go up either ladder to the raised deck. When you get off the ladder you have to go 10 feet to get to the controls.

The ship's crew rigged the baby boom to be used by the longshoremen in the loading of metal containers 20′ x 8′ by 8′ and 40′ x 8′ x 8′, weighing over 5 tons each. The con-

tainers were full. The ship's crew were engaged in an ongoing operation of preparing themselves to perform their lashing work to secure these heavy lifts. They were required to do the lashing, but not until the longshoremen were finished with the loading operation. The ship's crew brought over the lashing equipment consisting of turnbuckles made of metal 2½-3 feet long each; wires, the thickness of a finger 20 to 25 feet in length each; and chains. The equipment was greased and oiled to prevent rusting. They were ship's equipment, large enough presumably to adequately secure such heavy cargo.

The ship's crew placed this equipment on the raised deck at the ladders. When the longshoremen first started working at 8:00 A.M. there were a "few turnbuckles on deck near the forward part of No. 2". Throughout the day the ship's crew continued to bring more and more of this equipment and placed it on the raised deck so that by 5 minutes to 3, at the time of the accident, the entire area from the ladders to the place where the winch operators were to stand and perform their work had this equipment scattered thereon. It obstructed the passageway from the ladders to the winch controls. One had to step on top of such equipment in order to get to the place of work at the winch controls. There was no other way to go. The same situation existed on the raised deck from both ladders, forward on both sides of the deck to the winch controls. There was grease and oil on the deck which came from the greased equipment. It was described as "a mess on the deck". Plaintiff, in going to the winch, his place of work, slipped in the oil and grease, came in contact with the wires and turnbuckle, and fell. He never got to his place of work, the accident occurring approximately 4 feet from the offshore ladder.

Not only was the procedure on board the HELLENIC SPLENDOR to "tell" the crew to remove the equipment and not to put any more on the deck, and they conform—but the

longshoremen were not in a position to avoid the dangerous condition. They had to walk from the ladder over the obstructed area to get to their place of work. The accident occurred while en route to the place of work.

The Court and counsel understood that the place of the accident was not where plaintiff was to work, limiting the questions repeatedly to the conditions on the deck en route to the work area.

The longshoremen could not correct the dangerous condition. This would require a change of the careless method of operation engaged in by the ship's crew. Throughout the day they were increasing the amount of the lashing equipment with grease and oil in the walking area. When asked on cross-examination if he had ever moved a turnbuckle out of the way, plaintiff replied, "I could not do that because there were too many and I had to go to work."

The hatch boss told the seamen to take the equipment away and not to bring any more there. His instructions were to load or discharge the ship and that was all—, "Just loading, that's my job, not to clean the ship". Nor did the longshoremen have anything to do with the lashing of cargo.

The hatch boss cannot stop the work of the longshoremen when the crew does something wrong. It is the Chief Mate who can tell the longshoremen to stop working. The hatch boss had to report to the Mate. He testified:

> "Q. At this pier did the longshoremen work for the Hellenic Lines, Limited Steamship Company?
>
> A. Yes.
>
> Q. There is no private longshore company, is there?
>
> A. No.
>
> Q. At this pier, in your experience as a hatch boss, can you stop work?
>
> A. No, I can't stop work unless the superintendent, the chief mate, comes to tell me to stop work.

Q. What are your instructions when you see the crew is doing something wrong? What are you supposed to do?

A. I tell them not to do that a lot of time. I tell them not to do that, don't put that stuff over there, and many times it happen like that.

Q. If they don't correct the condition, must you continue working?

A. We are not going to stop. We are over there to make production, to work. If we stop every time there is something like that, we don't work then."

2. *Position of the Plaintiff*

1. The ship's crew created and maintained a dangerous condition of obstructing and slippery lashing equipment, consisting of greasy and oily turnbuckles, chains and wires, in the walkway of the main deck at the head of the ladder leading to the place of work. Complaints were made to ship's personnel, in accordance with the procedure on board ship, requesting they remove the obstructing and hazardous condition and not to continue to bring any further equipment to that area. The crew did not remove the equipment nor correct the dangerous condition, but continued to bring over more of same and increased the amount and area of the hazards so as to make same more dangerous. This was an ongoing operation by the seamen, negligently performed in an area under their control. Such a large and general condition of the deck made it necessary that plaintiff step on such equipment and the grease and oil thereon and therefrom while going to his place of work at the winch controls. The deck area involved was not within the confines of the cargo operations assigned to the longshoremen and did not arise out of the loading operations performed by the longshoremen. Under such circumstances:

A. The ship had the primary responsibility for the dangerous condition so created by them. *Doca* v. *Marina Mercante Nicaraguense S. A.* and *Pittston Stevedoring Corp.*,

634 F.2d 30 (2 Cir. 1980, cert. den. May 4, 1981) and *Canizzo* v. *Farrell Lines, Inc.*, 579 F.2d 682 (2 Cir. 1978, cert. den. 99 S.Ct. 316 (1978)).

B. In any event, HELLENIC LINES LTD., being both stevedore and shipowner hiring its own longshoremen, has the primary responsibility to inspect the work place and correct the dangerous conditions. There is no independent contracting stevedore upon whom shipowner may rely. *Canizzo* v. *Farrell Lines, Inc.* (Judge Friendly dissenting) and *Evans* v. *Transportacion Maritime Mexicana*, 639 F.2d 848 (2 Cir. 1981).

Under the circumstances the facts support the finding of negligence on the part of the ship and the jury was properly charged.

2. The jury verdict should not be disturbed. There was sufficient proof from which the jury could and did find defendant negligent and plaintiff permanently disabled.

3. Despite the claims made by shipowner herein, the real question is one of credibility of the witnesses and that is a question to be determined by the jury.

4. Shipowner took no exception to the judge's charge as it pertains to the matters raised, and approved of the special interrogatories that were submitted to the jury. Shipowner should not be supported now in its claim of error on the part of the District Court.

II.

Reason for Denying the Petition for a Writ of Certiorari.

1. *False Issue Raised by Petition*

The petition here should be denied since it is based on a false issue, misstatements of fact, serious errors in law and distortions of case holdings. There is no conflict within the Second Circuit, between Circuits, or with the Supreme Court decisions.

Petitioner's first Question Presented (Page 1 of Petition) is irrelevant and inapplicable under the facts of this case. Here the evidence shows that the ship's crew acted in a careless manner causing the accident complained of. They are responsible for their affirmative acts of negligence and there is no legal authority or principle which insulates a shipowner from responsibility for its affirmative acts of negligence in an area still under their control. This is particularly so where longshoremen (invitees) are required to walk in such area to get to the place of work. Our concepts of personal responsibility for our acts still holds one liable for the consequences which naturally flow therefrom when one can anticipate harm.

Therefore, on the facts here, whether an injured longshoreman is employed by an independent contractor or by the shipowner is immaterial.

Furthermore, it is naive to claim or hold that all shipowners are entitled to the identical "insulation" from liability. Responsibilities of shipowners vary with their business arrangements or contracts they enter into. It would be unjust to hold a shipowner equally free from responsibilities whether they hire expert independent contractors to perform for them or whether they assign their own employees to perform. In the former situation, the contractor

is primarily responsible for his employee's working conditions. In the latter situation, there is no one to whom shipowner can shift primary responsibility. They are attempting to shift it on to the longshoremen.

It is submitted that the rights of labor have not as yet eroded to the point where an employee hired to perform a specific task becomes responsible for the acts of his employer not involving this task. Nor can he be charged with having assumed the risks of his employment or the negligent acts of his employer.

Petitioner seeks to blur the issue further which must result in a philosophical irrelevant discussion. Petitioner seeks a response to the first Question Presented which would make it impossible for a longshoreman to sue his employer-shipowner regardless of its affirmative negligence. The question, as set forth, is open-ended and nebulous in scope. When read together with the Petition and the views expressed on appeal to the Circuit Court, it in effect claims that it is entitled to preferred treatment as compared to other shipowners; that it has no responsibilities towards its longshoremen even if petitioner is grossly negligent; that contributory negligence is a bar to the action; that where shipowner is concurrently negligent with others, it is insulated from liability; that it may defend against its employees by claiming assumption of risk; that its employees are charged with the negligence of shipowner and hence may not sue shipowner; that its longshoremen are not entitled to the same rights as other longshoremen employed by independent contractors under the law.

Under *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), the negligence of the shipowner stands on its own. The negligence of the shipowner is not imputed to the injured longshoreman. Since the shipowner's negligence in whole or in part caused the accident, it is responsible for 100% of the damages for its concurrent negligence.

The question Petitioner raises is couched in language which speaks in reverse, but the position of shipowner on this appeal and petition has been and is as set forth above.

The real issue here is whether an injured longshoreman, regardless of who employs him, can sue the shipowner for its negligence. Since that question has already been answered by *Reed* v. *Yaka*, supra and *Edmonds*, supra, this petition beomes frivolous.

Petitioner engages in an exercise in semantics when it attempts to show conflict with *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). On Pages 17 and 18 of the Petition it quotes from *Edmonds* and then concludes (19) that the Courts "must preserve the distinction between shipowner and stevedore"; and that case "mandates" that shipowner "be insulated from the consequences of the negligence of those employed in its stevedoring capacity".

Such conclusion becomes meaningless under the facts in our case. Here, the ship's crew performed their work in a negligent manner; they created the dangerous condition; they maintained such condition on deck at the head of a ladder in an area leading to the place of work; and they continued to perform such work in such unreasonable manner in an area under their control. What sense is there to insulating a negligent shipowner from the possible negligence of others in the use of said deck? The longshoremen did not supervise the ship's crew in the manner and method of the performance of their work on said deck.

Perhaps more cogent is the fact that the conclusion is unwarranted. It results from a misinterpretation of *Edmonds*. Petitioner omitted a portion of the Opinion which preceded the reference to the second sentence of Section 905(b) LHWCA. In that case shipowner claimed that under the first sentence a third party suit against the vessel is authorized when any part of the negligence causing the

accident is that of the vessel; that under the second sentence suits against the vessel may be barred when any part of the negligence is that of a co-worker also providing stevedoring service. The Court rejected such interpretation and construed the second sentence as permitting a third-party suit against the vessel providing its own loading and unloading services even when negligence in its stevedoring capacity contributes to the injury.

In such context, the question decided was—when can a third party suit against the vessel be brought? The Court's answer was that all longshoremen are to be treated the same, namely, all longshoremen may sue a shipowner as a third party for the injury caused by the negligence of a vessel. The emphasis is on the right to sue. Any negligence of a vessel permits a longshoreman to bring an action. By no stretch of the imagination could that be construed to "mandate" anything pertaining to shipowner's negligence. The Court did not interfere with the business arrangement or contract of employment entered into by the shipowner (voluntarily) and left untouched shipowner's obligations by reason thereof. The Court, however, did construe the Statute to leave untouched the rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover the entire amount of his damage from the ship.

2. *The Petition Misinterprets the Applicable Case Law*

The Second Circuit's Opinion in our case is logical and consistent with the holding of *Edmonds*. As the Circuit Court points out in *Doca* v. *Marina Mercante Nicaraguense S. A. and Pittston Stevedoring Corp.*, 634 F.2d 30 (2d Cir. 1980, cert. den. 5/4/81) where there is an independent contracting stevedore and the ship's crew creates the dangerous condition, the shipowner has the primary duty to correct such hazardous condition.

Shipowner's position is in the main irrelevant to the real issues in this case and by and large erroneous. *E.g.*, Defen-

dant here claims that although it is a shipowner employing its own longshoremen under the law as it interprets it to be, such a shipowner must be treated as two separate companies—one as a shipowner and the other as a stevedore, not an employer of longshoremen. Such claim is made despite the fact that there is only one company which owns and operates a vessel and hires its own longshoremen to load and unload cargo. Consequently, the defendant claims its split personality, or as it describes itself, as a company with "functional dichotomy", permits it to claim in this suit that it has no obligation to its longshoremen employees.

Shipowner claimed it relied on the L.H.W.C.A. as interpreted by the Supreme Court when it created its business structure. It claims that *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979) left no doubt that the 1972 Amendments preserved the validity of *Reed* v. *Yaka,* 373 U.S. 410 (1963) which HELLENIC LINES viewed as precedent for its "organizational validity". It also claims that *Reed* v. *Yaka,* supra and *Jackson* v. *Lykes Bros.,* 386 U.S. 731 (1967) required that a shipowner who acts as its own stevedore must retain "functional dichotomy" which is "necessary for imposition of liability recognized long ago in Reed v. Yaka."

Aside from the questionable meaning that shipowner ascribes to its "organizational validity", how patterning its organization after *Reed* v. *Yaka* justifies its erroneous claims is hard to fathom. There is no proof on the record of the reason for patterning as claimed. *Reed* does not speak of a "functional dichotomy" as necessary for imposition of liability. The basis of the Supreme Court holding in *Reed* v. *Yaka* is not that there is any division of function between being shipowner and employer. The Court stated:

> "We have previously said that the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' We think it would produce a harsh

> and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service."

Reed v. *Yaka* simply holds that where shipowner is also the employer of longshoremen and one of them is injured on board a vessel, he may collect benefits under the L.H.W.C.A. which is provided for him by shipowner-employer and he may also sue the shipowner-employer in spite of his receiving compensation benefits and in spite of the wording of the Statute which refers to compensation as being the exclusive remedy against his employer.

In *Jackson* v. *Lykes,* the Supreme Court reaffirmed *Reed* v. *Yaka* stating that to hold that a longshoreman employed by an independent stevedoring company may recover against shipowner but a longshoreman hired by the same shipowner to do the same kind of work cannot recover, is contrary to Congressional intent. "We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Congressional Act."

The "imposition of liability" on shipowner, therefore, does not depend on its functional or corporate structure.

Shipowner claims that their stevedoring employees here have a primary responsibility to correct dangerous conditions and Hellenic Lines, as shipowner, has the right to rely on its stevedoring *employees'* compliance with OSHA Regulations. Shipowner complains that the Court did not instruct the jury adequately on its right to rely on its employees and the so-called relevant safety regulations to give the jury a concrete idea of what the employees' primary responsibility consists of.

There is no basis for such complaint under the facts here and shipowner is wrong as to the applicable law. The L.H.W.C.A. sec. 41a as well as the OSHA regulations are specifically directed to the *employers* obligation, not the employees.

Shipowner seeks to avoid its status as an employer of longshoremen on the false premise that once you give them the right to sue the employer-shipowner, you no longer have an employer-employee relationship but a separate stevedoring company—in effect an independent contractor which always has the primary responsibility to correct dangerous conditions. Such is not the applicable law to our fact situation. *Doca* involved an independent contractor, but the circuit court there held on similar facts to ours that shipowner had the primary responsibility.

Furthermore it has been established that a shipowner's right to rely on stevedores rests on the existence of an independent contractor wtih a primary duty to correct dangerous conditions. The status of an independent contractor must exist to begin with. The clearest expression of the rule is found in Judge Friendly's dissent in *Canizzo* v. *Farrell Lines, Inc.*, 579 F.2d 682 (2 Cir. 1978) stating that:

> "Where, as in that case, [Napoli] there is no independent contractor, it is part of the ship's duty to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no 'independent contractor' with primary responsibility upon whom the ship may properly rely. As the *Napoli* court rightly said in rejecting the district court's charge in that case:
>
> > a charge which relieves a shipowner of liability for a dangerous condition which was 'known to the stevedore or to any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore. Napoli, supra, at 508." (689-690)

The shipowner in *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2 Cir. 1976) was HELLENIC LINES, the same shipowner in our case.

Shipowner admitted in the appeal to the Circuit Court that Judge Friendly's view so expressed is contrary to its position but claims that his thinking does not set forth the current view of the law. They claim that he did not have the benefit of *Edmonds* (1979) and other subsequent decisions. Again shipowner is in error. They misinterpret and misquote *Evans* v. *Transportacion Maritime Mexicana* (decided 2 Cir. 1981),which repeatedly cites the *Canizzo* dissent and emphasizes the importance of the independent contractor status.

Therefore, under the facts here, shipowner has the primary responsibility to correct dangerous conditions they create and maintain in the walkway on deck whether there is an independent stevedoring contractor or the longshoremen are employed by shipowner. Hence, shipowner here could not rely on the longshoremen employees correcting the dangerous condition and the charge to the jury was proper.

Shipowner-employer here seeks a change of status and requests special consideration from the courts to relieve it from Congressional action. It would do this by having its employees considered as "employers" under the Act. They would have plaintiff, its employee, become an "employer" even if he does not have employees employed in a maritime service or engaged in a business. They would place plaintiff in a position of being substituted for shipowner as employer as the one responsible for the penal provisions in Section 41(f) of 33 U.S.C. for failure to comply with Section 41(a). Shipowner seeks to escape its responsibilities at the expense of plaintiff, an employee. This is contrary to *Reed* v. *Yaka*, supra; *Edmonds* v. *Compagnie Generale Transatlantique*, supra, and Congressional intent in passing the L.H.W.C.A. including the 1972 Amendments thereto. Peti-

tioner's interpretation would also make plaintiff a longshoreman with lesser rights and greater obligations than other longshoremen employed by independent contractors contrary to *Edmonds*.

Controlling in our case is the law which holds shipowner responsible for its own affirmative acts of negligence. The testimony here is that the longshoremen were hired to load and unload cargo. They were not hired to clean a walkway or to maintain a vessel or such portions which are not "within the confines of the stevedoring operations". *Scindia Steam Navigaiton Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981). Plaintiff never got to the place of work at the winch controls but was merely going there. The hazardous condition did not "arise during the process of loading or unloading". *Evans* v. *Transportacion Maritime Mexicana*, 639 F.2d at 856. The longshoremen could not be held responsible for the crew's ongoing operations.

Furthermore, the ship may not defend on the ground that the longshoremen should have refused to continue to work because they had to walk to their place of work over a dangerous area. *Scindia Steam Nav. Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981).

Petitioner cites *Albergo* v. *Hellenic Lines, Ltd.*, 658 F.2d 66 (2 Cir. 1981) in support of its position. There the basis of the Court's holding was that the plaintiff could easily brush aside the ropes in the area where he was working and so avoid harm. He undertook to do so but did not do so adequately. This was his place of work. It is submitted that in other respects the majority opinion in Albergo is contrary to law as set forth herein. Were Albergo followed as interpreted by shipowner, contributory negligence would become a bar to the action.

In our case shipowner had a fair charge, yet shipowner here asks this Court to have the jury charged that plaintiff, a longshoreman employee, must comply with OSHA. This

is particularly wrong when the dangerous condition does not arise from the loading or unloading of cargo but from the ship's crew in the performance of its work in a negligent manner.

Were this Court to hold shipowner free from liability on the facts in this case—no shipowner-stevedore could ever be found liable for its negligent conduct.

3. *The Petition Is Contrary to the LHWCA and OSHA Regulations*

The defendant shipowner errs in its interpretation of The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., the OSHA Regulations 29 CFR 1918.1 et seq. and misinterprets its duties and exaggerates its rights thereunder to a point where said Act and the OSHA Regulations are emasculated.

There is no provision in law or in the OSHA Regulations which directs a split of Hellenic Lines into two independent companies. The fiction that defendant seeks to impose, is not supported by the Statute nor anywhere else.

Congress intended that the rights of an injured longshoreman to sue a vessel should not depend on whether he was employed directly by the vessel or by an independent contractor. (Page 11, Senate Committee Report #92-1125, 92nd Congress.) He may sue the vessel for damages if his injury is caused by the negligence of the vessel in whole or in part. The same principle of finding ships negligent applies whether the vessel employs its own longshoremen as pertains when an independent contractor employs the longshoremen. If the longshoreman cannot prove negligent causation by the vessel he cannot be successful in his action against the shipowner.

This, however, does not change the legal status of Hellenic Lines nor does it create a dual corporation. It def-

initely does not relieve shipowner of its obligation under the Statute which merely states (Sec. 905[b]) that an injured longshoreman may sue his employer-shipowner for negligently causing his injury.

The Statute was passed for the benefit of the injured longshoreman and seeks to protect him. Under said Section the injured plaintiff does not cease to be an employee of shipowner but he is merely given the right to sue shipowner for its negligence.

A short analysis of the various paragraphs pertinent to the question here presented would be helpful:

Sec. 902 (4) defines an "employer" as one whose employees are employed in maritime employment in whole or in part upon the navigable waters of the United States.

Sec. 902 (3) defines "employee" as any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations. The term "employee" does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload any small vessel under 18 tons net.

Note that the Statute specifically excludes vessels under 18 tons. By statutory construction and by the very terms of the Act persons employed to load or unload a vessel over 18 tons are included within the definition of "employees". Clearly, therefore, longshoremen employed by a vessel are covered within the term "employee" and the term "employer" covers such employees of the vessel.

Sec. 903 (a) deals with coverage under the Act and requires payment of compensation for the disability or death of an employee as defined.

Under Sec. 903 (a) (1) the Statute again mentions persons engaged by the Master to load or unload small vessels under 18 tons and states that no compensation shall be payable to them. Again by the exclusion, a vessel over

18 tons that employs persons to load or unload is required to pay compensation benefits as an employer.

Sec. 904 (a) holds the employer liable for and shall secure payment to his employees of compensation payable under Sections 907, 908, 909 and under 904 (b) "compensation shall be payable irrespective of fault as a cause for the injury."

Under Sec. 907 the employer is required to furnish medical, surgical and other attendance or treatment as the injury requires. The liability of an employer for such medical treatment shall not be affected by the bringing of a suit against a third party.

Under Sec. 905 (b) actions against vessels are permitted whether the vessel is in fact a third party or if it employs the injured party, providing negligence of the vessel caused the injury. This does not change any employer status; does not change any provision of the compensation act as to compensation benefits and medical benefits payable thereunder; does not make a longshoreman a self-employed person nor does he cease to be an employee under the Act; and does not change all the principles which are to be applied to determine the negligence of a vessel.

Sec. 941 (a) imposes the duty on every "employer" to furnish and maintain places of employment reasonably safe for his "employees in all employments covered by this Act". It provides that the Secretary may determine by regulations what is reasonably necessary to protect the life, health and safety of such employees to prevent injury to such employees.

Thus nowhere is there a direction or even an implication that shipowner ceases to be plaintiff's employer or that shipowner cannot be an employer under the Act or that shipowner is relieved of its responsibilities and obligations as an employer to its employees. Were it otherwise, as shipowner seems to be claiming, the shipowner-

employer here would not be responsible to secure workmen's compensation to pay its injured employees nor be required to furnish and pay for medical care and attention to cure its injured employees.

While shipowner Hellenic Lines Ltd. administratively reported to the United States Department of Labor that it is in the steamship business and that a longshoreman in its employ was injured, it now claims that as a steamship company it has no obligation under the Statute to conform to the Statute. For example, in a compensation claim medical procedures to be performed require authorizations from the employer. In our case Hellenic Lines failed or refused to grant such authorization. They claim that the injured plaintiff should have arranged for and paid for such medical procedures himself in an attempt to mitigate damages. When it was pointed out that Hellenic Lines was required to grant authorization and failed to do so and it was they who flouted the statutory requirement and sought to impose an obligation on the injured man when the Statute intended to protect him from such hardship, the following transpired at trial.

"Mr. Reid: I object to this line of questioning. May we approach the bench?

The Court: Yes.

(At the side bar)

Mr. Reid: Your Honor, this claim is in compensation and she is treating under the compensation. We have a suit here for damages and in the suit for damages the shipowner has no duty, like he owes to a seaman, to furnish prompt, proper medical care and attention.

Under the compensation law, the stevedore is obligated to furnish the medical care to a longshoreman. What Mr. Lassoff is trying to do and to show is that I have an obligation to give this man prompt, ade-

quate medical care and attention by way of tests and medical treatment and that is not the law. That is the law for seamen but not for longshoremen.

Glaring is the claim that despite the foregoing sections of the Statute, only the stevedore is obligated to furnish medical care to a longshoreman and a shipowner-employer of longshoremen has no duty to furnish medical care and attention under the Statute. Such absurd result finds no basis in law. Such tampering with the Compensation Act without any legal or equitable basis, therefore, is gross in its implications.

Nor does the shipowner stop there in its erroneous claims. It now seeks to foist an interpretation of the Statute on this Court to the effect that it is not an employer and hence has no duties whatsoever running to its employees under the Statute.

Under 33 U.S.C. Sec. 941 (a) pursuant to which the Safety and Health Regulations for Longshoring, CFR 1918.1 et seq. were promulgated, it is the "employer" as defined in the Act who is responsible for violation or refusal to comply with the provisions thereof. Despite that, they claim that shipowner is not bound by any safety regulations but to the contrary it is the longshoremen who perform the work as such employees of shipowner who are responsible for any violation of same. There is no justification for such shifting of responsibility or changing of a contractual relationship between plaintiff and his employer. This employment arrangement was voluntarily entered into by shipowner and is binding in all respects. Yet shipowner claims that when its contract with its employees places it in a position of being responsible for a breach of a common law, maritime law or statutory obligation owed by an employer to an employee, such employment contract should be ignored. This is hardly a position which should be encouraged by the Courts.

4. *The Non-Existent Conflict Between Circuits and the Supreme Court Under the Facts Presented*

Petitioner's claim of conflict between the Opinion of the Circuit Court in our case and other cases is indicative of confusion on their part or an attempt to create confusion. They cite cases which are either totally irrelevant or are misrepresented as to their holdings,—so that what is against them becomes for them.

Petitioner claims *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31, 41-43 (3rd Cir. 1975) is in conflict with the lower court in our case when in fact it is not. Here the defendant as shipowner is charged with negligent conduct since the ship's crew created the dangerous condition in a walkway on deck; failed to correct the condition when they were in control of the area; maintained same; and performed their work in a negligent manner. There is no question but that on the facts here there was "owner occasioned negligence" which means that they were not relieved of liability. The entire discussion in the cited Opinion pertains to the question of whether or not an employee can sue his employer-shipowner under Sec. 905(b). That case was decided before *Edmonds* v. *Compagnie Generale Transatlantique*, supra.

In *Smith* v. *M/V Captain Fred*, 546 F.2d 119, 122-23 (5th Cir. 1977), plaintiff, a repairman, sued his employer-vessel for its negligence. The Fifth Circuit stated the question to be— "——whether the rule of *Reed* v. *The Yaka*, 373 U.S. 410,—survived the passage of the 1972 Amendments to the Longshoremen & Harbor Worker's Compensation Act". (120) The Court stated that the dominant intent of Congress was to help longshoremen. "Why should an employee be treated differently solely because the ship on which he is injured happens to be owned by his employer instead of a third party?" (122) All longshoremen should have the right to sue shipowner under the same circumstances. The Court noted that an employee

may sue his employer qua vessel if injured as a result of the vessel's negligence. It noted that *Napoli* v. *Hellenic Lines Ltd.*, 536 F.2d 505 (2 Cir. 1976) and *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, supra were in agreement with them.

In *Richardson* v. *Norfolk Shipbuilding & Drydock Corp.*, 621 F.2d 633, 634-35 (4th Cir. 1980), a barge was used to perform repair work. The only work performed by the barge was such repairs. The crane operator acted primarily as a repairman. His negligence caused the accident to plaintiff, a sandblaster. The Court held that a co-employee repairman caused the accident and so that defendant could not be sued under Sec. 905(b).

Similarly in *Cavalier* v. *T. Smith and Son, Inc.*, 668 F.2d 861, 862 (5th Cir. 1982) plaintiff's employer owned and operated a floating crane on a barge with a crew of a crane operator and a flagman. It was used to load and unload cargo. Plaintiff was a longshoreman employed in the hold of a vessel in connection with such stevedoring work. The accident occurred because of the negligence of the barge crew. The Circuit Court held that the crew and plaintiff were performing stevedoring services to the vessel and hence no suit could be brought under that Section.

None of the aforementioned are pertinent to our case. In an attempt to justify its erroneous view, Petitioner claims support from *Smith* v. *Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 795-97 (2 Cir. 1979). They are again in error. The Court there held that shipowner remains liable for its own failure to exercise care. "For example, the owner retains the responsibility for supplying a safe place to work, although the stevedore assumes that responsibility when it is given exclusive control over the work place". (794) In our case shipowner retained control of the area—this was an open deck at the head of a ladder. The crew was supposed to correct the dangerous condition. They created it and left it knowing that the longshoremen had to walk in that area. They continued

to perform their work and repeatedly made the condition of the walking area more dangerous so as to be engaged in a dangerous method of operation.

In *Smith* v. *Eastern Seaboard Pile Driving, Inc.*, supra, plaintiff was a driver-repairman. The Circuit Court found that aside from the fact that there were negligent acts involving safety features which were akin to failure to provide a safe place to work,—it cannot be said that the "responsibility for providing a safe vessel from which to dive was at any time delegated to employees acting primarily as repairmen". (796) The Court went on to say that *"Although Eastern might have escaped liability if it had surrendered control over the operation to a sub-contractor that could supply and supervise its own divers, that course was not chosen"*. (796) (Emphasis supplied).

It is important to note that the Circuit Court also stated that courts are to be guided by land-based principles of tort law. It went on to say that *Napoli* v. *Hellenic Lines, Ltd.*, supra, "—imposed upon the shipowner a duty to the land-based employee equivalent to that owed to an invitee by a possessor of land". (795)

Thus, Petitioner's positions herein are in conflict with those in the *Smith* Opinion, yet that case is cited in support of same. Thus is confusion generated.

Petitioner is so pre-occupied with the word "functional" that it reaches to cases far beyond any relevancy here. The cited cases involve the question of jurisdiction under Federal Compensation Law. E.g., *Sea-Land Serv., Inc.* v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629, 632-33 (3rd Cir. 1976). (As long as employment nexus with maritime activity is maintained, the Federal Compensation remedy is available regardless of situs of accident producing injury). The question in these cases is what specific work was an employee performing at the time of the accident so as to determine if there is a connection with maritime activity. The reasoning of Peti-

tioner is also flawed here. Arguendo such cases, when referring to "function" are doing so as it pertains to employees. Petitioner translates that to mean as it pertains to stevedores and shipowners. There is no basis for such translation and is erorneous.

Petitioner's observations with respect to *Scindia Steam Navigation Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981) are erroneous. In our case we are not dealing with dangers created or which arise in cargo operations.

De Los Santos does hold that shipowner must exercise due care to avoid exposing a longshoreman to harm from hazards he may encounter in areas under the active control of the vessel during stevedoring operations.

Petitioner also errs in stating that shipowner is not to be burdened with primary responsibility for safety as set forth in Note 10 of *De Los Santos*. (p. 29 Petition). That footnote refers to cargo operations once stevedore begins its work. It does not deal with the question of primary responsibility. The opinion does refer to Section 941 of 33 U.S.C. as requiring the longshoreman's employer to provide a reasonably safe place to work and to take such safeguards with respect to working conditions as the Secretary of Labor may determine to be necessary. The Court's rationale was that the shipowner was not the common employer of longshoremen and therefore does not owe a statutory duty under Section 941. Obviously, the Court was referring to an independent contracting stevedore and its statutory duty.

However, the opinion does state that the shipowner does not have a general duty by way of supervision or inspection to discover dangerous conditions that develop "within the confines of the cargo operations that are assigned to the stevedore". This *is subject to there being no contract provision, positive law* or *custom to the contrary.*

In our case, Petitioner shipowner was the longshoreman's employer by contract; the condition was created by

the ship's crew; did not develop within the confines of cargo operations nor was the area assigned to the stevedore. Perhaps the better reference is to footnote 25 in *De Los Santos* in which the Court noted with interest the reliance of the Circuit Court (2 Cir.) on the Joint Maritime Safety Code which was described as "the commonly agreed on practices for working together safely" in the Port of New York. That Code states that the "owner, master and officers of the vessel shall supply and maintain in safe condition for use all—work spaces which are to be used in stevedoring operations".

The claimed unique tripartite maritime relationship (p. 30 Petition) in this case does not exist. There is merely a shipowner employer and its longshoremen employees. Again, shipowner exhibits flawed reasoning in an attempt to find merit in a review of the decision of the lower Court.

5. *The Evidentiary Ruling of the Trial Court Should Not Be Interfered With*

With respect to the second Question Presented by Petitioner pertaining to evidentiary matters, no conflict between cases or Circuits is even claimed. There are no grounds set forth justifying the Supreme Court granting certiorari. Petitioner is merely quarreling here with the opinion of the District Court and the Circuit Court (2 Cir.). Does such quarrel warrant the Supreme Court of the United States granting the Writ and hearing argument? The answer is obviously in the negative.

The reasons set forth in the Opinion in the Circuit Court (A15-A18 Petition) as well as in the Opinion of the District Court (A43-A45 Petition) pertaining to income tax, is both legal and equitable justification for the determination of the Circuit Court.

This is *not* a situation where shipowner's position had been clearly made to the Court and further objection would

be unavailable. Here shipowner did not urge at trial the position they now take; did not raise the issue at any time during the trial; did not indicate it was relying on tax returns; and did not object or take exception to the Court's charge pertaining to this matter. There was no ruling by the Trial Court on any requests to charge. After all the evidence was in, the trial completed and the jury verdict in, shipowner raised the issue for the first time on the post trial motion. Nor did shipowner at any time submit or offer any evidence in support of their present contention.

Petitioner cites *Lang* v. *Texas and Pacific Ry. Co.*, 624 F.2d 1275, 1279 (5th Cir. 1980) as supporting its position. That case does not require any action by the Supreme Court here. That was an FELA case. At issue there was a request that the Court charge the jury, in effect, that the amount of the award is not taxable income to the plaintiff and should not be increased by reason of Federal income taxes. The Court there refused to so charge. In our case a charge to that effect was given to the jury. Other requests were simply not acted upon and ignored. The Circuit Court in *Lang* noted in Footnote 4, page 1279, the *Liepelt's* holding that the Trial Court erred in excluding evidence offered to show the effect of income tax on estimated future earnings. "Evidence of decedent's net income after taxes was not offered in *Lang*; this aspect of *Liepelt*, therefore, is not applicable". The same may be said for our case. The tax returns referred to by Petitioner were not an indication of future tax liability.

The Circuit Court (2 Cir.) noted in Footnote 7 (A17-A18 Petition) the variables that might effect future income tax liability. It is submitted that in addition to those listed, attorney's fees for the handling of this case and appeals and trial costs constitute deductible expenses.

In *Liepelt*, the lower court excluded evidence offered to show the effect of income taxes on decedent's estimated future earnings. They produced expert testimony by an

actuary as to what the taxes would be. There was no such offer of evidence here and no such testimony was excluded. Nor was there any objection made to the Judge's charge as it pertains to this matter. The Trial Court in our case did charge that the award would not be subject to income tax.

Liepelt was an FELA case. The Court pointed out that the measure of damages under the Act is decedent's financial contribution to his survivors had the accident not occurred. FELA, however, unlike a number of other Federal Statutes does not authorize recovery of attorney's fees by the successful litigants. The Court there pointed out in Footnote 9 that under a number of Federal Statutes the recovery of attorney's fees by the successful litigant was authorized. Therefore, there cannot be a claim of desired uniformity to deprive plaintiff of his right to deduct the cost of litigation including attorney's fees as an expense.

In *Edmonds,* the Supreme Court stated that Admiralty Law is judge-made law to a great extent and a longshoreman's maritime tort action against a shipowner was recognized long before the 1972 Amendments to the LHWCA and still is. The liability of the ship to the longshoreman is determined by a combination of judge-made and statutory law. Sec. 905(b) of 33 USC states that longshoremen may bring actions against shipowners as third parties in accordance with the provisions of Section 933. The latter Section was unchanged in 1972. We are, therefore, dealing with long established law applicable to longshoremen's suits and Congress apparently did not intend changing it. The case of *McWeeney* v. *New York, New Haven & Hartford R.R. Co.,* 282 F.2d 34 (2 Cir.) (en banc), cert den., 364 U.S. 870 (1960), has been the law in the Second Circuit and it did not permit deduction for income taxes. The Court there mentioned a number of reasons for their holding, amongst them being the offset of the cost of trial expenses and attorney's fees.

There is no indication that Congress intended to change that rule and a reading of *Liepelt* does not indicate a mandate by the Supreme Court to make such change in longshore maritime cases.

It is submitted, therefore, that should the Supreme Court grant a Writ of Certiorari on the second Question Presented, it should do so only for the purpose of passing on the question whether *Liepelt* must be applied to all longshore maritime cases and if so, whether trial expenses and attorney's fees in the case constitute a deductible expense.

Respondent however does not urge the granting of a Writ on the Second Question Presented since the denial of the Petition would do substantial justice in this case.

III.

CONCLUSION

There is no merit to Petitioner's claims. There is no legal or equitable reason to grant a Writ of Certiorari herein. It is, therefore, submitted that the Petition should be denied.

Respectfully submitted,

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